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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SOUTHERN CALIFORNIA EDISON
COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF THE
COUNTY OF LOS ANGELES,

Respondent;

JOSHUA HILD, A MINOR, BY AND
THROUGH HIS GUARDIAN AD LITEM,
KAREN HILD,

Real Party in Interest.

B176449

(Super. Ct. No. BC 294734)

ORIGINAL PROCEEDING; petition for writ of mandate. Mel Red Recana,
Judge. Petition granted.

Law Offices of Don H. Zell, Don H. Zell, Daniel Brett Smith and Michael
Gonzales, for Petitioner.

No appearance for respondent.

Bisnar & Chase, John P. Bisnar and Brian Chase for Real Party in Interest.

INTRODUCTION

Petitioner/defendant Southern California Edison (Edison) challenges denial of its motion for summary adjudication. The trial court found that a triable issue of material fact existed as to whether Edison had ratified its employee's conduct when, instead of terminating her, it suspended her without pay for three days as punishment for injuring a fellow employee's child by "roughhousing" on the job. We grant the petition.

FACTUAL AND PROCEDURAL HISTORY

Edison's employee Karen Magdaleno injured Joshua Hild when she interrupted her work and interjected herself into a paintball gun game that Hild and some other children were playing. Magdaleno shot Hild in or near his eye.

The operative complaint, which seeks punitive and exemplary damages against Edison, the sole defendant, alleges insofar as is relevant, that Edison believed that Magdaleno had intended to shoot Hild, and that Edison had ratified her misconduct by suspending her for three days without pay, instead of terminating her. Punitive and exemplary damages are dependent upon Edison having ratified Magdaleno's conduct. The complaint alleges that Hild was blinded in the injured right eye.

Edison moved for summary adjudication on the sole ground that no triable issue of material fact existed as to Hild's claim that it had ratified Magdaleno's behavior. Edison maintained that it could not have ratified Magdaleno's conduct because it had conducted an investigation and disciplined her in conformity with its policies and procedures governing good cause discipline of union employees.

Supporting evidence established the following:

On Saturday, March 22, 2003, Magdaleno interrupted her work duties to play with a group of boys engaged in a paintball gunfight. She borrowed a gun, summoned Hild, and shot him in the eye. That afternoon, Magdaleno called her supervisor Andrew McMillan at home, and asked to meet with him concerning an accident. The two met in the parking lot in front of the Edison division office. Magdaleno tearfully informed

McMillan that, while on duty, she had engaged in a paintball gun game with some of the local boys, and she had accidentally fired a paint ball gun, bruising Hild's right eye and causing it to swell shut.

The same afternoon, Magdaleno wrote a note that recounted the incident.¹ She said that she had intended to shoot Hild, but not in the face, and that the paintball gun had accidentally discharged while she was holding it, hitting the bone close to Hild's eye socket. She expressed deep regret for the injury, and stated her willingness to accept any punishment that Edison deemed necessary and to pay to the Hild family any related costs.

McMillan wrote a supervisor's note that summarized what Magdaleno had told him. It included Magdaleno's admission that she had been aware of Edison's policy against horseplay prior to the incident, and had violated the policy.

The following Monday, March 24, 2003, McMillan reported the incident to his supervisor, Kathleen Dunkle, and gave her Magdaleno's and his notes. Dunkle then discussed the incident with her manager, Jeffrey McPheeters, who told her to conduct an investigatory meeting.

Magdaleno's conduct violated Edison's accident prevention policy, which forbade employees from engaging in practical jokes, scuffling, or horseplay. A violation of that policy subjected an employee to disciplinary action.

Magdaleno was a union employee. Edison's policies and procedures for disciplining union employees required progressive discipline in four steps: oral reprimand, written reprimand, suspension, and termination. The policies and procedures excepted from the progressive steps a situation "when the employee commits an offense that is so egregious that any reasonable person would know that such an act is unacceptable and could result in discipline."

¹ The same day, McMillan made a typewritten copy of the handwritten note that corrected spelling and grammar and made some other changes. Magdaleno read and signed the typewritten note, and McMillan destroyed the handwritten one.

Edison's union employees were protected by "just cause" termination provisions in their collective bargaining agreements, and managers were instructed to consider seven specified factors before imposing discipline. Edison's just cause directive advised managers to notify the employee of her right to steward representation, inform her of the nature of the alleged misconduct, and provide her the opportunity to give her side of the story and explain what happened. It also advised that "[a]ll witnesses must be interviewed, relevant material reviewed and due consideration given to mitigating circumstances," and that, if necessary, the employee should be placed on investigatory suspension until all facts were gathered.

At the same time, the policy advised managers that a fair investigation "needs to be conducted in a timely manner," that an investigation should commence immediately, two or three days after the alleged misconduct, at the latest.

With respect to penalty, Edison's policy mandated that discipline be consistent, and that the degree of discipline administered to an employee be reasonably related to the seriousness of the employee's proven offense and to the employee's employment record.

Edison's policy directed managers to focus on the what, when, where, who, and why of the incident for which disciplinary action was being considered. The decision regarding discipline was to be determined by: the employee's entire work history and discipline record; the nature of the offense, including whether the offense did or could cause injuries; and the employee's intent, i.e., whether the action was accidental, or deliberate and malicious. The continuum of possible disciplinary action ranged from a letter to an employee's file to termination.

Dunkle conducted an investigational meeting with Magdaleno on Tuesday, March 25, 2003, three days after the incident. McMillan was an observer. Prior to the meeting, Dunkle had contacted an Edison attorney to insure that the meeting and discipline would be handled in a manner consistent with Edison policy. In Dunkle's view, because Magdaleno had already admitted that she had violated the Edison policy against horseplay, there was no need to prove a violation.

The question and answer portion of the investigational meeting took 20 minutes. Magdaleno, who appeared without union representation, stated that she did not know why the paintball gun had gone off, and she did not recall pulling the trigger. No other witnesses appeared.

Hild's father had contacted Dunkle and McPheeters prior to the investigational meeting. He had told them that he believed his son's injury had been accidental, and he had urged that Magdaleno should not be terminated. But he was not interviewed, and his statements were not considered in determining the level of Magdaleno's discipline. At the time of the meeting, the only evidence Edison had regarding the extent of Hild's injury was the initial report that Magdaleno had given. Dunkle had made no attempt to ascertain Hild's current medical condition.

The meeting recessed for a half hour to consider discipline and to deal with a suicide note that Magdaleno had left for her son. During deliberations, Dunkle contacted McPheeters to relate what had occurred during the question and answer session, and also contacted Edison's legal department to confirm that the discipline under consideration, a three-day suspension without pay, was consistent with company policy. The meeting resumed for 10 minutes during which Dunkle informed Magdaleno that she would be suspended for three days without pay.

In arriving at the decision to impose a three day-suspension without pay, Dunkle, McPheeters, and McMillan took into consideration Magdaleno's exemplary 22 year employment history, her admission that she had engaged in "horseplay," her remorse and acceptance of responsibility, and the apparently accidental nature of Hild's injuries.

On this record, Edison maintained that it had repudiated Magdaleno's misconduct and that it was entitled to summary judgment as a matter of law.

In opposing Edison's motion, Hild contended that Edison's retention of Magdaleno, in and of itself, was sufficient evidence of ratification to require denial of the motion. During argument, Hild also asserted that Edison's failure to investigate the extent of Hild's injuries and to bring in any witnesses other than Magdaleno was separate

circumstantial evidence of ratification, because a trier of fact could reasonably infer that the limited nature of the investigation indicated that Dunkle, McPheeters, and McMillan had made up their minds, prior to the investigational meeting, not to consider serious discipline.

The trial court found that Edison's retention of Magdaleno, in combination with the way Edison had conducted its investigation, was circumstantial evidence of ratification, and it denied Edison's motion. The trial court cited Edison's failure to contact Hild's treating physician to ascertain the extent of Hild's injuries as a factor from which a jury could infer that Edison had made up its mind about disciplining Magdaleno prior to conducting its investigational meeting.

DISCUSSION

A. Standard of Review

We review a motion for summary adjudication de novo. (*Transamerica Ins. Co. v. Superior Court* (1994) 29 Cal.App.4th 1705, 1713), considering the evidence presented to the trial court and independently determine its effect as a matter of law. (*Ibid.*) We engage in the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and decide whether the opposition has demonstrated the existence of a triable issue of material fact. (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 385.) In reviewing a motion for summary adjudication, we strictly construe the moving party's evidence and liberally construe the opposition. (*Everett v. Superior Court* (2002) 104 Cal.App.4th 388, 391.)

B. Ratification

“Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him.”

(*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1490-1491.) Ratification may occur expressly or by implication. (*Ibid.*) The burden of proving ratification is upon the party asserting its existence, and it may be proven by circumstantial as well as direct evidence. (*StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 242.) An agent's originally unauthorized act may be ratified by implication where the only reasonable interpretation of the principal's conduct is consistent with approval or adoption. (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.)

In general, "[r]atification requires full knowledge by the principal of all of the material facts at the time of the act of ratification." (*Dufresne v. Elite Insurance Co.* (1972) 26 Cal.App.3d 916, 926.) But an employer can be deemed to have ratified an employee's misconduct if the employer's managing agent had the opportunity to learn of the behavior, and failed to investigate (*Pusateri v. E.F. Hutton & Co.* (1986) 180 Cal.App.3d 247, 253), if the circumstances put a reasonable person on inquiry notice. (*Reusche v. California Pac. Title Ins. Co.* (1965) 231 Cal.App.2d 731, 737.)

An employer who completely fails to discipline an employee after being informed of an employee's misconduct can be deemed to have ratified that misconduct. (*Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1430.)² It is a complete failure to *discipline*, not a failure to *terminate*, that evidences ratification. In *Fretland v. County of Humboldt*, *supra*, 69 Cal.4th at p. 1478, the court held, as a matter of law, that an employer had not ratified an employee's assault and battery, where the employee had received a "letter of warning" that directed him "to treat all employees with fairness and

² See, also, *Greenfield v. Spectrum Investment Corp.* (1985) 174 Cal.App.3d 111, 121 overuled on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 ["Mr. In was not terminated or penalized by Budget because of his actions"]; *Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 524 ["Leasing's retention of Kesler and failure to challenge Kesler's authority to act in its behalf constituted a ratification of Kesler's conduct."]; *Sandoval v. Southern Cal. Enterprises, Inc.* (1950) 98 Cal.App.2d 240, 250 ["Haley testified that neither Mooney nor the manager had reprimanded or criticized him."].

respect.” (*Id.* at p. 1491.) Magdaleno’s three-day suspension without pay was unquestionably more severe, and was a repudiation, not a ratification, of her misconduct.

That a trier of fact might weigh the factors considered by Edison, and conclude that a severer form of discipline would be appropriate, does not create a triable issue of material fact regarding ratification. The issue is not whether Magdaleno’s punishment was severe enough, but whether the punishment manifested tacit approval of her conduct.

Moreover, we find no circumstantial evidence of ratification in the manner in which Edison determined Magdaleno’s discipline. That Magdaleno had engaged in misconduct was always admitted. Consequently, the only arguable reason for Dunkle to interview percipient witnesses to Magdaleno’s wrongdoing would have been if Dunkle had harbored a reasonable suspicion that Magdaleno had deliberately injured Hild. But the information available to Dunkle, including Hild’s father’s gratuitous statements, was to the contrary.

Similarly, we find no circumstantial evidence of ratification in Dunkle’s decision to conduct the investigational meeting within three days of the incident. Edison’s good cause disciplinary policies and procedures stressed that time was of the essence in conducting an investigation, and specifically advised that an investigation should commence no later than two or three days after a disciplinary incident.

Finally, there are no inferences to be drawn from Dunkle’s failure to ascertain the extent of Hild’s injuries or his prognosis prior to disciplining Magdaleno. That Magdaleno’s misconduct had caused a serious injury was established immediately, and the record is silent concerning what Dunkle would have learned about Hild’s condition had she inquired.³

³ Hild filed voluminous exhibits in opposition to the petition, but because these documents were not part of the challenged motion, we disregard them.

DISPOSITION

The petition for writ of mandate is granted, the order to show cause is discharged, and the matter stay heretofore issued is dissolved. Petitioner is to recover its costs.

NOT FOR PUBLICATION.

_____, P. J.

BOREN

We concur:

_____, J.

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